

No. 3103

In the
**United States Circuit Court
of Appeals**

For the Ninth Circuit

PORTLAND CATTLE LOAN COMPANY, a corporation,

Plaintiff in Error.

vs.

OREGON SHORT LINE RAILROAD COMPANY,
a corporation,

Defendant in Error.

Brief for Defendant in Error

**On Writ of Error to the District Court of the
United States for the District of Oregon**

CAREY and KERR and CHARLES A. HART,
Yeon Building, Portland, Oregon, Attorneys for
Plaintiff in Error.

GEO. H. SMITH, A. C. SPENCER and W. A.
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Oregon, Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

On September 28, 1912, the Portland Cattle Loan Co., caused A. G. Greenmeyer to deliver to the Pecos & Northern Railway Company, at Hereford, Texas, 44 carloads of cattle for transportation from that point to the Portland Cattle Loan Company, at Napa, Idaho. The defendant in error and its connecting carriers transported said 44 carloads of cattle from Hereford, Texas, to Amarillo, Texas, where the said 44 carloads were combined into 43 carloads and were thereupon transported over the connecting lines of railroad to Pocatello, Idaho, at which place 27 of said 43 carloads of cattle, upon the order of the Portland Cattle Loan Company, were delivered to them by the Oregon Short Line Railroad Company.

The Portland Cattle Loan Company thereupon ordered the Oregon Short Line Railroad Company to divert and transport 16 of said 43 carloads of cattle to Butte, Montana, at which point said 16 cars were afterwards delivered to the Portland Cattle Loan Company.

Upon arrival of the 27 carloads of cattle at Pocatello a rate of \$136.50 per car was erroneously assessed and collected by the Oregon Short Line Railroad Company and thereafter, upon the earnest solicitation of the Portland Cattle Loan Company, the Oregon Short Line Railroad Company erroneously refunded to them the sum of \$20.00 per car, leaving a net collection on the 27 cars moving to Pocatello, Idaho, of \$116.50.

Thereafter the auditor of the Oregon Short Line Railroad Company, in checking up said payments,

discovered that the lawful, published and filed tariff applicable to said movement provided a charge of \$142.90 per car, making a total undercharge on each of said cars of \$26.40.

On the 16 cars moving from Hereford, Texas, to Butte, Montana, the Oregon Short Line Railroad Company originally assessed and collected the sum of \$164.80 per car. The auditor, in re-checking these collections discovered that the lawful, published and filed tariff rate applicable to said movement was \$171.20 per car, leaving an undercharge of \$6.40 per car on each of the 16 cars moving from Hereford, Texas, to Butte, Montana.

In making the refunds in question the Oregon Short Line Railroad Company also paid to the Portland Cattle Loan Company the sum of \$75.70 interest. In other words, the account foots up as follows (not counting interest) :

1 car cattle, Hereford to Amarillo, at \$26.40 per car	\$ 26.40
27 cars cattle, Hereford to Pocatello, at \$142.90 per car	3,858.30
16 cars cattle, Hereford to Butte, at \$171.20 per car	2,739.20
	<hr/>
	\$6,623.90
Paid on account	\$6,342.30
Refund in error Jan. 20, 1915....	\$387.70
Refund in error Sept. 17, 1915....	228.00
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Total Refund in error.....	\$615.70 \$ 615.70
Amount paid on account after deducting re- funds	5,726.60
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Balance due	\$ 897.30

This case was tried at Portland, Oregon, before Mr. Judge Wolverton, April 16, 1917, and thereafter judgment was rendered in favor of defendants in error. Said decision is reported in 245 Fed. at page 214.

POINTS AND AUTHORITIES.

I.

It is conceded that the shipper is bound to pay, and the carrier is obliged to collect the lawful, published and filed tariff rate, regardless of any mistakes of the shipper or the carrier in applying the proper rate.

L. & N. Ry. Co. v. Maxwell, 237 U. S. 94-97
(citing a number of U. S. cases).

II.

Where there are no applicable joint through rates established, shipments even if moving on through bills of lading must take the combination of local rates.

Kas. City So. Ry. v. Albers Comm. Co., 223
U. S. 573-596.

ARGUMENT.

Judge Wolverton in 245 Fed., page 214, has summed up the issue in this case very concisely, as follows:

"The plaintiff claims that under joint live stock tariff 100-A, then in force, the proper charges on these shipments are made up as follows: local from Hereford to Amarillo \$26.40 per car, and from Amarillo to Pocatello \$116.50 per car, making a total of \$142.90 per car for the shipment of 27 cars. To Butte, the same

local from Hereford to Amarillo, to which is added \$125.00 to Dillon, Montana, and the local from Dillon to Butte—\$19.80, making a total of \$171.20. The entire controversy centers about the local charge of \$26.40 from Hereford to Amarillo, the defendant insisting that Hereford is a common point with Amarillo and that the rate designated under Sec. 2 of the tariff constitutes the entire rate from Hereford to Pocatello.”

It is therefore necessary to analyze the tariffs in question to determine the legal applicable rate applying on these shipments.

The court will observe, by referring to page 24 of Plaintiff's Exhibit 1, the following:

“Item 200—covering use of differentials shown in Sec. 1, pages 24 to 31 inc. The differentials shown in Sec. 1 are to be added to, or deducted from, the Amarillo or El Paso-Deming rates as shown in Sec. 2 hereof, pp. 32, 51, inc., to arrive at the through rate, *where application and routing is provided, on pages 56 to 69.*”

Referring to pages 56 to 69 of Plaintiff's Exhibit 1, it will be observed, on p. 56, under “Application of rates” appears the following note:

“Rates provided herein from points of origin shown in Sec. 1, to points of destination shown in Sec. 2, will apply only via the route indicated in chart on p. 57, except as provided in item 350 (item 350 is not material in this discussion).

“Note 1. *Where route number is not shown there are no through rates applicable from the originating line to the destination line via any route except as specifically provided in Sec. 3.*” (Sec. 3 has no bearing on the controversy.)

It is therefore necessary to refer to the route and application chart shown on p. 57 of Plaintiff's Exhibit 1, to determine whether or not there are any applicable through rates from Pecos and Northern Texas Railway points to Oregon Short Line points.

By referring to p. 57 of Plaintiff's Exhibit 1, it will be observed that the Pecos and Northern Texas Railway Company is mentioned in the chart on the twelfth line from the top of the page, and the Oregon Short Line Railroad Company is mentioned at the top of the page in line 15, counting from the left hand side of the page. It will also be observed where these two lines meet, no route number is inserted, which means, as is stated in item 360, in note 1, p. 56 of Plaintiff's Exhibit 1—"Where route number is not shown, there are no through rates applicable from the originating line (Pecos and Northern Texas Railway) to the destination line (Oregon Short Line Railroad points)." No through rates or through route being authorized by the tariff it follows that the rate applicable must of necessity be made by a combination of the published rates.

Referring to Plaintiff's Exhibit 2 it will be observed that it is 47 miles from Hereford, Texas, to Amarillo, Texas, and on (pencil) page 7, the tariff provides "When exact distance is not shown, use next greater distance." It will be observed that the next greater distance mentioned in the tariff, than 47 miles, is 50 miles. Referring to A. T. & S. F. Tariff No. 6016-E—I. C. C. 5280, it will be observed, for a distance of 50 miles, on cattle in carload lots, a rate of 12c per cwt. is provided for a 36-ft. 6-in. car, with minimum of 22,000 lbs. which makes the local rate of \$26.40 from Hereford to Amarillo.

On the 27 cars of cattle moving from Hereford

to Pocatello the rate of \$142.90 per car is constructed by a combination of the local rate of \$26.40 applicable from Hereford to Amarillo, plus the Pocatello rate (Idaho Falls rate) of \$116.50, making a total charge of \$142.90 per car from Hereford to Pocatello.

Referring to the index of points of destination shown on p. 9, *et seq.*, of Plaintiff's Exhibit 1, it will be noted that Pocatello is not named as a point of destination, thereby making it necessary to make an intermediate application of the Idaho Falls rate under item No. 5, on p. 18 of Plaintiff's Exhibit 1, which reads as follows:

"To a point of destination not named in Sec. 2 of this tariff, but which is directly between two points to which specific rates are named, in such section, the rate to apply will be the rate to the more distant of the two points between which the intermediate point is located; routing to be the same as applies to the more distant point."

Referring to Sec. 2, on p. 50 of Plaintiff's Exhibit 1, it will be noted that no specific rate is named to Pocatello, but specific rates are named to Idaho Falls, Idaho, and Cheyenne, Wyoming, and an examination of the map in evidence in this case will show that Pocatello, Idaho, is intermediate to these points, and is the more distant of said points, therefore under the intermediate application above referred to, the specific rate of \$116.50, shown on p. 50 of Exhibit 1, as applying from Amarillo group to Idaho Falls, on carload lots of 10 cars or more, is the proper rate to apply. The rate therefore, from Hereford, Texas, to Pocatello, Idaho, would be a combination of the local rate from Hereford to Amarillo, of \$26.40, plus the rate from Amarillo to

Pocatello (Idaho Falls rate) of \$116.50 or a total rate of \$142.90.

In regard to the 16 cars moving from Hereford to Butte the rate is constructed by a combination of the local rate of \$26.40 applying from Hereford to Amarillo, plus the rate of \$125.00 applying to Dillon, Montana, plus the rate from Dillon, Montana, to Butte, Montana, of \$19.80, making a total of \$171.20 per car.

The court will observe by referring to p. 50, Plaintiff's Exhibit 1, under index 2060, a specific rate of \$125.00 per car in lots of 10 cars or more is provided on shipments of livestock moving from the Amarillo group to Dillon, Montana. Referring to the map in evidence, it will be noted that Butte is located north of Dillon, and that no specific through rate from Amarillo to Butte is named on p. 50 of Plaintiff's Exhibit 1. It therefore becomes necessary to assess the local rate of \$26.40 from Hereford to Amarillo and the rate from the Amarillo group to Dillon of \$125.00 per car and then assess the local rate applying from Dillon to Butte. This last rate is shown under index 15, p. 9, O. S. L. Local and Joint Tariff 3281, I. C. C. 14069, which provides a rate of \$18.00 for 30-ft. cars from Dillon to Butte, and supplement 14, under same tariff, provides 110 per cent of this rate for cars 33 ft. 9 in. to and including 36 ft. 7 in. inside measurements which makes the total rate from Dillon to Butte, Montana, \$19.80 for 36 ft. 7 in. cars. The combination of these rates makes a total charge of \$171.20 per car applying on the 16 cars moving from Hereford, Texas, to Butte, Montana.

As we stated in the beginning, the real controversy in this case centers about the charge of \$26.40

from Hereford to Amarillo, the other rates are practically conceded by the defendant to be correctly applied, and as stated by Judge Wolverton, in 245 Fed. 215: "When we turn to the note on p. 56 (Plaintiff's Exhibit 1) respecting the application of rates we will find that the rates from points of origin shown in Sec. 1 (Plaintiff's Exhibit 1) to points of destination shown in Sec. 2, will apply only via the routes indicated on p. 57. This is a specific declaration, general in scope, without reference to differentials, that the rate so provided will apply only via the routes designated on p. 57. The note thereto is but a reinforcement of the idea . . . but whatever may be the true rendering of the notes to Sections 1 and 2 the notes on p. 56 explaining the 'application of the rates' are directly applicable to the present controversy, as no Oregon Short Line routing is shown on shipments coming from and over the Pecos and Northern Texas Railway on p. 57 and, as we have seen, the regulation is general, and specifically limits the application of rates to points in Sec. 1, to points of destination in Sec. 2, to the routes indicated in the chart on p. 57." Mr. Judge Wolverton's language very tersely and ably sums up our views of this entire situation.

Counsel states, in his brief, on p. 23, that witnesses, S. J. French and R. A. Rankin, called on behalf of defendant in error, were not as well qualified to interpret the tariffs in question, as Mr. Geo. Anderson and J. H. Lothrop, witnesses called on behalf of plaintiff in error. In this connection counsel neglected to point out to the court, as is shown on p. 90 of Transcript, that Mr. Anderson was the traffic manager for the Portland Cattle Loan Company, and is the man who secured the

erroneous refunds in question and, as a matter of fact, is more interested in the outcome of this case than any of the witnesses on behalf of defendant in error, and he is naturally anxious to have this court adopt his interpretation of the tariff. Furthermore Mr. Lothrop, as shown on p. 129 of Transcript, is traffic manager of the Portland Traffic & Transportation Association, in charge of rate and traffic matters for that association, and it is part of his business to assist jobbers and shippers in securing refunds from the railroad companies, in all cases where it is at all possible.

Mr. French, as is shown by his testimony (Trans. p. 49, *et seq.*), has been continually engaged in the interpretation of tariffs for the period of fourteen years, and Mr. Rankin (Trans. p. 152) has had entire charge of the facts and circumstances involved in this case for something over one year, and both witnesses were eminently qualified to testify in this case.

In conclusion, therefore, we submit that the judgment of the lower court should be affirmed for the reason that the tariffs in question plainly show there are no through rates, or through routes, from points on the Pecos and Northern Texas Railway to Oregon Short Line points, for the following reasons:

1. The application of rates is defined on p. 56, Plaintiff's Exhibit 1, and points out specifically that rates will apply only via the routes indicated in the chart on p. 57.

2. The chart on p. 57 shows that no through route is shown from Pecos and Northern Texas Railway points to Oregon Short Line points.

3. The basis of rates from points on the Pecos

and Northern Texas Railway are shown in Sec. 1, p. 26 of Plaintiff's Exhibit 1, and the rates to points on the Oregon Short Line Railroad are provided in Sec. 2, p. 50.

4. Item 360, p. 56, Plaintiff's Exhibit 1, states that rates provided in tariff from points of origin shown in Sec. 1, to points of destination shown in Sec. 2, *will apply only via routes indicated in the chart on p. 57, and note 1 of same item states that "where no route is shown there are no through rates applicable from originating line to destination line."*

5. The last paragraph of item 200, Sec. 1, p. 24, Plaintiff's Exhibit 1, states, where no differentials are shown the Amarillo or El Paso-Deming rates, as shown in Sec. 2, are to be applied *as indicated*. Sec. 2 *indicates* that Amarillo or El Paso-Deming rates *apply where application and routing is provided on pp. 56 to 69 inc.* An examination of the route chart on p. 57 shows that no application of routing is provided, it follows, therefore, that there can be no through rate or through route from Hereford, or any other points on the Pecos and Northern Texas Railway to points on the Oregon Short Line Railroad, regardless of whether there is provided a differential over or under the Amarillo rate.

7. No through rates and no through routes are described or mentioned in the tariffs in question, from any points on the Pecos and Northern Texas Railway to any point on the Oregon Short Line Railroad.

Respectfully submitted.

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